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IN THE
Supreme Court of the United States

October Term, 1965
No. 511

AMERICAN TRUCKING ASSOCIATIONS, INC., NATIONAL MOTOR FREIGHT TRAFFIC ASSOCIATION, INC., THE PENNSYLVANIA RAILROAD COMPANY,
Appellants,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, SOUTH PATERSON TRUCKING COMPANY, INC., and PRIVATE CARRIER CONFERENCE, INC., and THE PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

MOTION TO AFFIRM OF THE PENNSYLVANIA PUBLIC UTILITY COMMISSION

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On Appeal From the United States District Court for the Eastern District of Pennsylvania

MOTION TO AFFIRM

In accordance with Rule 16, paragraph 1 (c) of the Revised Rules of this Court, intervening appellee, The Pennsylvania Public Utility Commission, moves that the judgment of the district court be affirmed.

STATEMENT

In accordance with 28 U.S.C. 2284 and 2235, appellants have taken a direct appeal from a judgment of the three-judge District Court for the Eastern District of Pennsylvania, which dismissed the complaint to set aside the order of the Interstate Commerce Commission.

The Interstate Commerce Commission ("I.C.C.") by an order dated May 21, 1962, instituted a rule-making proceeding to determine whether it had jurisdiction over intrastate movements by motor carriers where private carriage either preceded or succeeded the movement to and from another state.

The I.C.C. on March 2, 1964, by a vote of 7-4, held that it had no jurisdiction over motor carriers performing the within-state transportation on the ground that the private carriage could not be tacked to it.

On September 28, 1964, the Pennsylvania Railroad Company filed a complaint in the United States District Court for the Eastern District of Pennsylvania, seeking to set aside the final order of the Commission. The Pennsylvania Public Utility Commission petitioned, and was granted leave to intervene in these proceedings as a party defendant. On April 23, 1965, the District Court issued its decision dismissing the complaint. On June 11, 1965, it entered a final judgment and decree.

ARGUMENT

This case presents no substantial question warranting plenary consideration by this Court:

I. THE MOTOR CARRIER ACT OF 1935 DID NOT UNDERTAKE TO SUBJECT TO I.C.C. JURISDICTION MOTOR CARRIER TRANSPORTATION WHOLLY WITHIN ONE STATE ALTHOUGH PRIVATE CARRIAGE BY THE OWNER TOOK THE GOODS FROM OR TO ANOTHER STATE

The Pennsylvania Public Utility Commission ("P. U.C."), which is charged by the Legislature of the Commonwealth of Pennsylvania with the duty of regulating intrastate transportation by common carriers of property by motor vehicle, has intervened in this proceeding on the side of Interstate Commerce Commission. Our Commission regulates transportation by a motor carrier wholly within our State although the owner or shipper brought it from, or is taking it to, another state. *Rule Issued Against M. F. Rockey Transportation Co.*, 41 Pa. P.U.C. 263, 270 (1963). In that case our Commission said:

> "Delivery to the ultimate consignee or owner is the termination of the journey, even though the consignee or owner may continue to carry the goods in interstate commerce. See Pennsylvania R. R. Co. v. P.U.C. of Ohio, 298 U.S. 170."

The P.U.C. has a strong interest in the outcome of this proceeding, since an adverse decision would materially affect its jurisdiction over intrastate motor carriers.

(a) Appellants' Argument Impractical

In this day and age, when commerce between the states is in a state of perpetual motion, we have people living in one state, working in another; shippers and customers who are neighbors, but located in different states, etc. Up until now the rule of *Pennsylvania R. Co. v. P.U.C. of Ohio*, 298 U. S. 170 (1936), has made for convenient administration. If a person from New Jersey takes a non-exempt taxi or bus in Philadelphia to another point in Pennsylvania, this movement between two points in Pennsylvania has been always regarded as subject to the jurisdiction of the P.U.C. The carrier does not ask the customer where he came from nor need he be concerned. The customer boarded the bus in Philadelphia and since the carrier has rights from the P.U.C. from Philadelphia to Ardmore, it can transport that customer to Ardmore. Under the appellant's argument, that bus can no longer transport the customer to Ardmore since that customer started out from New Jersey. How would the bus driver know where he started out from? There is no joint freight bill or delivery receipt.

Many persons in one state may drive to another and board motor vehicles in the other state in non-exempt transportation and, according to the plaintiff, the carrier could not transport that passenger unless it had I.C.C. rights, although it had no way of knowing where the passenger originally came from.

The same illustration given for passengers is true of property. A customer bringing goods from N.J. to the ABC Truck Terminal in Philadelphia for delivery to another point in Pennsylvania presents a similar situation.

The carrier has no way of knowing where that customer originally took the goods from. Moreover, even if the carrier found out that the goods were originally brought from New Jersey, the carrier would then have to decide whether another principle of constitutional law comes into play:

> "The instances are many where a local shipment follows quickly upon an interstate shipment and yet is not to be deemed part of it, even though some further shipment was contemplated when the original movement began."
>
> *B. & O. S.W.R.R. Co. v. Settle*, 260 U. S. 166, p. 173.

Is the carrier to be charged with the making of constitutional decisions? These and other instances could be cited to show the practical impossibility of applying the rule being contended for by the appellant.

(b) Interchange in a Different Category

An interchange between two common carriers is in a different category entirely. They have bills of lading, freight bills, etc. to establish plainly beforehand the continuous interstate movement of the cargo.

(c) Pennsylvania Railroad Company v. P.U.C., 298 U.S. 170, is Controlling

The I.C.C. recognized the *Pennsylvania* case as controlling. That case, in short, held that private carriage by the owner cannot be tacked to common carrier movement by railroad to make the common carriage by railroad subject to I.C.C. regulation. The Supreme Court in that case held that the "interstate transportation" did not begin until the goods were committed to a common carrier. The Court was not interpreting the definition of interstate commerce, because "not all commerce is transportation." The inquiry in the *Pennsylvania* case was "not whether the movement of the coal is to be classified as commerce . . . between the states." The question before the court concerned the regulation of "transportation" in interstate commerce. The Supreme Court had to determine when the "transportation" which Congress made subject to the I.C.C. began. Did it begin in Pennsylvania or in Ohio?

Section 1, 49 U.S.C., §1, provides:

"(1) That the provisions of this part shall apply to common carriers engaged in—

(a) The *transportation* of passengers or property etc."

The important concept for I.C.C. regulation is "transportation," and not "commerce." Appellants miss this very essential concept in the *Pennsylvania* decision and are diverted into conceiving that the primary test is whether the motor carriers are engaged in interstate commerce.* The question is not one of commerce, but of transportation! The commerce tail cannot wag the transportation dog.

The same concept is carried over into Part II of the Interstate Commerce Act, with which we are here concerned.

Section 202, 49 U.S.C. §302, provides:

> "(a) The provisions of this part apply to the *transportation* of passengers or property by motor carriers engaged in interstate or foreign commerce . . ."

The "transportation" which Congress had in mind in Part I is the transportation which begins when the goods are placed in the hands of a common carrier. "Transportation begins for that purpose [application of Interstate Commerce Act], if not for others, when the merchandise has been placed in the possession of a carrier, (cases

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* In the Jurisdictional Statement of American Trucking Associations, Inc., and National Motor Freight Traffic Association, Inc., (page 6) appellants say:

> "It is clear from the foregoing that a private carrier transporting his freight by motor vehicle from a place in one state to a place in another is engaged in interstate commerce as defined in Section 203(a)(10), and that he is subject to the regulatory authority of the Commission."

cited)" meaning "common carrier." *Penna. R. Co. v. P.U.C.*, 298 U.S. at p. 175.

Appellant's first and basic error is to ignore the basis upon which the Supreme Court placed its interpretation in the *Pennsylvania* case. Plaintiff, in effect, assumes that Congress had intended by the term "transportation" in Part I to include private carriage as well as common carriage, but by virtue of a limitation in para. (2)(a) eliminated rail transportation wholly within one state. Appellants then reason that since the Motor Carrier Act does not have this same limitation, the I.C.C. must have jurisdiction. Without conceding that the Motor Carrier Act does not have the same limitation, which we think it does, it is obvious to us that the appellant has misinterpreted the Supreme Court's decision in the *Pennsylvania* case.

The Supreme Court's decision was not based upon the limitation cited, although that is tangentially mentioned, but upon its interpretation of the word "transportation." This should be obvious to appellant in the statement made by the Court clarifying this as follows: "If the *concept of transportation* is in need of expansion, it is for the legislative department of the government to determine how great the change shall be."

The Court states at the outset of its discussion that it is not concerned with interpreting the concept of commerce since the Act only applies to "transportation," and not all commerce is transportation. The greater includes the latter or the lesser, but the latter does not include the former. And the transportation with which the Act is concerned is transportation by common carriers.

Section 1 says that "the provisions" apply to "the transportation of passengers or property by railroad," etc. The Supreme Court, borrowing from the definitions in Section 1 (3), 49 U.S.C. §1 (3), stated that the term "carrier" when used, means "common carrier" only. *The transportation to be regulated by the I.C.C. is transportation by common carrier.*

The definitions contained in Part II are just as clear. Sec. 202, 49 U.S.C. §302, states: "(a) The provisions of this part apply to the *transportation* of passengers or property by *motor carriers* engaged in interstate or foreign commerce, etc."

Under the Definitions in Sec. 203 (16), 49 U.S.C. §303 (16), "The term 'motor carrier' includes both a common carrier by motor vehicle and a contract carrier by motor vehicle."

Therefore, the *transportation* which Congress sought to regulate in Part II was confined to the transportation of common carriers or contract carriers.

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(1) Private Carriers Distinguished

In another section of the Act, Congress sought to subject private carriers to the safety regulations. (Sec. 204 (a) (3), 49 U.S.C. §304(a) (3)), but it never sought to subject private carriers to the regulation of transportation. The provisions of Part II were to apply only to the *transportation* by motor carriers which, by the definition, was limited to common or contract carriers.

Therefore, the Supreme Court's interpretation under Part I of the word "transportation" should be the same

under Part II, since the same wording is used. This, then, was the crux of the Supreme Court decision in the *Pennsylvania* case.

So far as the role of the limitation is concerned, this is clearly seen to be a secondary one.

When the Supreme Court referred to the limitation in Sec. 1(2) (a, b), 49 U.S.C. § 1(2) (a, b) it said: *Moreover.* "There are limitations, moreover," etc. The word "moreover" was definitely intended to be a secondary process of reasoning, and not the main one as appellant seems to think.

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(2) Coe v. Errol

In support of its conclusion that the "transportation" concept with which Congress was concerned in the Interstate Commerce Act, was common carrier transportation, the Court cites *Coe v. Errol, inter alia. Coe v. Errol* is the leading case of the cases cited. That case, although concerned with a problem in taxation, contains language which the Court no doubt had in mind in citing that case.

The Court in *Coe vs. Errol* said, in part:

> "When the products of the farm or the forest are collected and *brought* in from the surrounding country to a town or station serving as an entrepot for that particular region, whether on a river or a line of railroad, such products are not yet exports, nor are they in process of exportation, *nor is exportation begun until they are committed to the common carrier for transportation out of the state to the state of their destination*, or have started on their ultimate passage to that State."

The Supreme Court in the *Pennsylvania* case interpolates the *Coe v. Errol* decision into the *Pennsylvania* case. The Court in *Coe v. Errol* also said, in further explanation:

> "Though intended for exportation, they may never be exported; the owner has a perfect right to change his mind; and until actually put in motion, for some place out of the state, or *committed to the custody of a carrier for transportation to such place,* why may they not be regarded as still remaining a part of the general mass of property in the State?"

(d) There is the Same Limitation in Part II

To crystallize our argument, we say that the Supreme Court in the *Pennsylvania* case merely interpreted the word "transportation" as applying to transportation by common carrier and this is why private carriage cannot be tacked onto common carriage to make the within-state common carriage subject to I.C.C. regulation. The same process of reasoning would apply in Part II since the provisions of Part II are only to apply to "transportation by motor carrier", which we have seen is defined to mean transportation by common carrier or contract carrier. That is the extent to which Congress exerted its power over *transportation.*

Appellants do not see this argument, but rather argue that the limitation in Part I led to the decision in the *Pennsylvania* case. We cannot agree with this. But, even assuming, arguendo, that appellant is correct in this regard, it would seem to us that the same limitation also exists in Part II, which would, under appellants' process

of reasoning, make the *Pennsylvania* decision applicable to Part II.

There is a similar limitation provision in Part II and Part III (Water Carriers). Part I was enacted in 1887, Part II in 1935, and Part III in 1940. In each Part there is a similar limitation to satisfy the states-rights element. Naturally, when Part II was drafted, some 48 years later, the framers wanted to protect the state rights even more, as to taxation, license fees on highway, etc., and so the limitation provision would not have been expected to be written in the same language of 1887 when taxation and state highway charges were not so important.

These three sections read as follows:

"I. Railroads. Section 1 (2) (b)

(2) The provision of this part . . . shall not apply—

(a) To the transportation of passengers or property, or to the receiving, delivering, storage, or handling of property wholly within one State and not shipped to or from a foreign country from or to any place in the United States as aforesaid, except as otherwise provided in this part;

"II. Motor Carriers. Section 202 (b)

Sec. 202

(a) . . .

(b) Nothing in this part shall be construed to affect the powers of taxation of the several States or to . . . authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power

of regulation of intrastate commerce by motor carriers on the highways thereof.

"III. Water Carriers. Section 303 (j)

Sec. 303.

...

(j) Nothing in this part shall be construed to interfere with the exclusive exercise by each State of the power to regulate intrastate commerce by water carriers within the jurisdiction of such State."

There is no foundation whatsoever to support appellants' contention that Congress was thinking in terms of greater regulation when it formulated the limitations in Part II as compared with that in Part I.

(e) Appellants' Arguments

Appellant, American Trucking Associations, Inc., cite *Air Dispatch, Inc. v. U. S.*, 237 F. Supp. 450 (1964), for some support. But in that case motor carriage was being tacked to *common carriage*. Appellant then says "substituting private motor carriage for the air carriage, we submit the situation presented here is essentially no different" (p. 14). But that is the distinction between the cases!

Nor is there any constitutional barrier to the I.C.C. regulating private carriers in interstate commerce as to safety only. Congress did not see fit to regulate private carriage economically and, wisely so, because of the many

problems that would be created. Therefore, while private carriage is not involved in the concept of "transportation" under the Act, it is still commerce.

There is no hiatus of regulation because the states have adopted the same definition of transportation and do not recognize the tacking of private carriage to common carriage for regulatory purposes. Our Commission has exercised control and will continue to do so. That is why we have intervened in this case. Appellants' version of a no man's land is not borne out by the facts.

CONCLUSION

A careful reading of *Pennsylvania R. Co. v. P.U.C. of Ohio* shows that it was based upon the interpretation given to the word "transportation." That word was interpreted as being applicable to common carriers only under Part I. The same phraseology is essentially contained in Part II.

Congress intended only to regulate the transportation of common or contract carriers by motor vehicle. It did not seek to encompass anyone else so far as transportation was concerned. But, in the regulation of safety it sought to encompass private carriers as well. Appellants' primary error is that they assume erroneously that Congress intended to regulate everything in interstate commerce, and that since private carriers are in interstate commerce they are to be regulated not only for safety but also transportationwise. Appellants are placing the emphasis in the wrong place. Congress sought to regulate transportation,

and then only when the goods were committed to a common carrier.

It is respectfully submitted that the issue in this case is clear and free from doubt and does not present any substantial question for decision. It is therefore respectfully requested that our Motion to Affirm be granted.

Respectfully submitted,

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In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MEMORANDUM FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

These are direct appeals from a final judgment of a three-judge district court (J.S. 30–31) [1] dismissing an action brought to set aside the report and orders of

[1] "J.S." refers to the jurisdictional statement filed in No. 510.

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the Interstate Commerce Commission in *Motor Transportation of Property Within a Single State,* 94 M.C.C. 541 (J.S. 32–51). The Commission decided (with four members dissenting) that for-hire motor transportation within a single State of property which moved (or will move) interstate is not subject to economic regulation by the Commission under Part II of the Interstate Commerce Act if the movement across State lines is by private—rather than for-hire—carriage. The Commission relied upon *Pennsylvania R. Co.* v. *Public Utilities Commission,* 298 U.S. 170, which reached the same conclusion with regard to the Commission's jurisdiction over railroads under Part I of the Act. The Commission's order was affirmed *per curiam* by a three-judge district court (J.S. 27–29).

The legal issue presented by this case concerns the reach of the Commission's jurisdiction over for-hire motor transportation of out-of-state goods moving between points located in the same State. The Commission's holding that it lacks economic regulatory authority if the connecting interstate movement is performed by the shipper is supported by the construction given its authority over railroads in the *Pennsylvania R. Co.* case, *supra.* By analogy, the Commission's authority over motor movement may be deemed to attach only if there is a for-hire segment crossing State lines. But there are differences between the parts of the Act which make the analogy imperfect. Under Part II, for example, the Commission has jurisdiction to reach interstate private carriage for safety (not economic) purposes and, in the

report below, it left open the possibility that the for-hire carriage here at issue might be interstate transportation for purposes of safety regulation (J.S. 45–46).[2] And the language used to define the Commission's jurisdiction is different in these two parts of the Act. Before the decision below, two of the Commission's divisions had, in seven reported decisions, reached conflicting conclusions as to its economic authority over the carriage at issue (J.S. 40–43). We cannot say that the question of the Commission's statutory jurisdiction is so insubstantial as not to warrant plenary hearing. In this respect, therefore, we do not oppose the noting of probable jurisdiction.

We add, however, that the record might be thought to provide an insufficient basis for determining whether there is any significant practical impact to the decision. The statements before the Commission were brief and did not state facts indicating the actual or potential scope of the intrastate for-hire movements at issue. The jurisdictional statements contain representations that the decision will have an adverse impact upon railroads and regulated truckers (No. 510, pp. 21–23; No. 511, p. 5), but there is no precise measure of the substantiality of such harm, and the complaints made no allegations of injury to appellants. While no question regarding justiciability of the dispute was raised below, and the posture of the case is similar, in some respects, to the posture

[2] In addition, Part II has specific provisions dealing with economic regulation of transportation between points within a State when such transportation is in interstate commerce within the meaning of the Act. See Section 206(a)(6), 49 U.S.C. 306(a)(6).

of *Frozen Food Express* v. *United States,* 351 U.S. 40, when that case was decided by this Court, we believe it appropriate to call attention to this procedural problem at the present time.

Respectfully submitted.

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